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No. 86-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT K. MORROW, INC., Trustee,
Petitioner,

vs.

AGRI-BEEF CO., INDEPENDENT GRAIN CO., and WALDRIP BROS. CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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ARGUMENTS FIRST RAISED IN THE BRIEF IN OPPOSITION

Rule 22.5 of the Rules of the United States Supreme Court provides that "[a] reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner." The brief in opposition has raised for the first time the following three arguments:

1. That this case is not important enough to merit review by this Court because it involves a controversy over a relatively small amount of money.

2. That the *Kenitra* issue should be decided by the Court, if at all, in some other pending Ninth Circuit case involving a large sum of money.

3. That certiorari should be denied because counsel for respondents decline to advocate their clients' legal position before the Court.

NEW CASE LAW

The Trustee calls attention to a newly decided case, *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986), pursuant to the provision for filing a supplemental brief at any time while a petition is pending calling attention to "new cases . . . not available at the time of the party's last filing." (Rule 22.6.)

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REPLY BRIEF

Petitioner Robert K. Morrow, Inc., Trustee, replies herein to the brief in opposition to petition for writ of certiorari ("brief in opposition") filed by respondent Waldrip Bros. Co. ("respondent").

I

REASONS FOR GRANTING THE WRIT

The Trustee has shown, in the petition filed with this Court, that "special and important reasons" exist to grant

the writ. (Rule 17.1.) The petition demonstrates that the holding by the Court of Appeals in this case conflicts with decisions reached by three other circuit courts. The petition also describes an important question of federal law which has not been, but should be, settled by the Court.

The brief in opposition raises issues that are entirely outside the record regarding the question of federal jurisprudence addressed by the court below. That question is whether, for purposes of 11 U.S.C. § 547(b), the debtor's property is "transferred" upon delivery of an uncertified check to the creditor or when such a check is honored by the drawee bank. Since the brief in opposition nowhere disputes that there are special and important reasons for the Court to grant the writ, the Court should consider the petition as unopposed.

In addition, the Trustee respectfully draws the Court's attention to a recently decided case, *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986). The Trustee has just discovered that case, which was decided after *Kenitra* but before the petition was filed. While *White River* is a judgment under 11 U.S.C. § 547(c)(2), rather than section 547(b), the Tenth Circuit's reasoning implies generally that a check is transferred on the date of delivery. To that extent, the *White River* opinion widens the split of authority between courts of appeal concerning transfers made by check relative to the preference statute.

II

ARGUMENT

A. When A Debtor's Property Is Deemed Transferred By Check Under 11 U.S.C. § 547(b) Is An Important Question of Federal Law Regardless of The Amount In Controversy

Preference litigation under section 547 of the Bankruptcy Code comprises a significant portion of the cases tried before the bankruptcy courts. The trustee cannot make out a prima facie case for the existence of a voidable preference unless the transfer of the debtor's property occurred within the preference period. The outcome of preference actions often depends upon whether the debtor's property is transferred, for purposes of section 547(b)(4), on honor of the debtor's uncertified check by the drawee bank. In the petition, the Trustee has cited 5 cases decided under the Bankruptcy Code which hold that the transfer occurs when the creditor receives the debtor's check, and 20 cases which hold that the transfer takes place upon the check's honor. (Petition 12-13.)

The importance of the question is not affected by the amount in controversy. The total amount that the Trustee sought to recover in the *Kenitra* lawsuits was $30,605.66. In other cases, the sum sued upon might be, and frequently is, $3,000,000. The aggregate of the sums affected by this controversy undoubtedly reaches into the billions.

B. The *Kenitra* Question Can Best Be Resolved By Granting A Writ of Certiorari To Review The Decision In *Kenitra*

There are other bankruptcy court cases involving the *Kenitra* issue already pending in the Ninth Circuit. (Brief in Opposition 1.) Indeed, the Trustee's out-of-state counsel represent plaintiffs in such adversary proceedings. The retention of out-of-state counsel in *Kenitra* is indicative of the widespread importance of determining when a debtor's property is transferred by check for parties engaged in bankruptcy litigation.

As a matter of judicial economy, it makes little sense to compel trustees, creditors' committees and debtors-in-possession in the Ninth Circuit to pursue a multitude of preference lawsuits involving the *Kenitra* issue before bankruptcy courts, bankruptcy appellate panels, district courts and the Court of Appeals. The lower courts are bound by the rule of law set down by the circuit court. The Ninth Circuit cannot reasonably be expected to reverse its recent holding in *Kenitra*. Forcing this issue to be tried again through the Ninth Circuit would be nothing more than an exercise in futility and waste.

Moreover, the last paragraph of the *Kenitra* decision makes plain enough that any further challenge of "a well-settled Ninth Circuit rule" would invite the imposition of sanctions and reduction of fees. 797 F.2d at 791. (Petition A-3.)

The *Kenitra* question has been squarely posed by the Ninth Circuit decision and can best be resolved by review of that decision.

C. Certiorari Should Not Be Denied Because Counsel For Respondents Decline to Argue Their Clients' Case

The Rules of the United States Supreme Court do not provide for denial of the writ simply because counsel for respondents decline to argue their clients' legal position. Otherwise, respondents could defeat a petition for writ of certiorari merely by failing to contest it.

Both sides of the issue in *Kenitra* have been fully briefed before the Ninth Circuit. There is no reason to believe that such vigorous advocacy could not be continued before this Court.

D. The Widening Split of Authority On The *Kenitra* Question Should Be Resolved To Safeguard The Predictability of Commercial Transactions And Bankruptcy Administration

As the petition points out, the Second, Seventh and Eleventh Circuits held under the analogous preference provisions of the Bankruptcy Act that a transfer of the debtor's property is effected when the check clears the drawee bank. (Petition 6-9.) By contrast, the Ninth Circuit held in *Shamrock Golf Co. v. Richcraft, Inc.*, 680 F.2d 645 (9th Cir. 1982) that the transfer is complete upon the check's delivery. The Ninth Circuit sharpened the conflict by its decision under section 547(b) of the Bankruptcy Code in *Kenitra*.

The recent opinion by the Tenth Circuit in *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986), decided subsequent to *Kenitra*, widened still further the split of

authority regarding when a transfer made by check occurs with respect to the preference section.

In *White River*, the Tenth Circuit addressed the question whether transfers by check were "made not later than 45 days after such debt was incurred" for purposes of the affirmative defense provision of 11 U.S.C. § 547(c)(2). The checks in question were delivered to the creditor less than 45 days after the debt was incurred, and honored by the drawee bank more than 45 days after the debt accrued. The bankruptcy court held that lease payments fell outside the section 547(c)(2) defense based on the date-of-honor rule and the district court affirmed. The Tenth Circuit reversed, holding that the transfers occurred upon delivery of the checks. 799 F.2d at 633.

White River concerned when a check is transferred with respect to the affirmative defense set forth in section 547(c)(2). Thus, the holding in *White River* is not applicable per se to *Kenitra*, which adjudicated when a transfer by check occurs for purposes of proving the prima facie case under section 547(b)(4). Nonetheless, the reasoning of the *White River* opinion is sufficiently broad to extend the decision's impact to consideration of whether a check transfer takes place within the preference period.

The *White River* court noted that it was persuaded by the First Circuit's analysis in *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 37-38 (1st Cir. 1984), in holding that a transfer occurs upon delivery of the check. 799 F.2d at 633. In *O'Neill*, the First Circuit stated that "[s]ince checks are normally considered present payments between parties, *Engstrom v. Wiley*, 191 F.2d 684 (9th Cir. 1951), the *delivery* of a check should supply the time of transfer" (emphasis in original). Likewise, *White River* cited, 799 F.2d at 634, a district court in Michigan to the effect that "in the

commercial world receipt of a check, as distinguished from the date it clears the drawee bank, is customarily looked upon as the date of payment of an obligation." *Young Supply Co. v. McLouth Steel Corp.*, 55 B.R. 356, 357 (E.D. Mich. 1985).

It is significant that both the *O'Neill* and *Young Supply* decisions, on which the *White River* opinion relies, point to the Ninth Circuit's holding in *Shamrock* to support the proposition that receipt of a check should be looked upon as the date of transfer. 729 F.2d at 37; 55 B.R. at 357. Such references to *Shamrock* point up the cross-fertilization between analysis of a check's transfer under the affirmative defenses of section 547(c) and under the prove-up of the prima facie case. Most courts have held that the debtor transfers no property, for purposes of section 547(b), until the drawee bank honors the check.[1] However, some courts, such as *Kenitra*, have mistakenly applied the rationale of the section 547(c) affirmative defenses to the elements of section 547(b).

Article I, § 8, cl. 4, of the United States Constitution provides that Congress shall have power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *See, Railway Labor Executives Assn. v. Gibbons*, 455 U.S. 457, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). Congress has established such a uniform law in enacting the Bankruptcy Code, and the section on the avoidance of preferences is one of the statute's most frequently litigated provisions.

The widening split of authority on the *Kenitra* question undermines the uniformity required by the Bankruptcy

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[1] Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 28 Vand. L. Rev. 713, 761-63 (1985).

Clause. Creditors receiving payments from troubled business enterprises now face radically different legal consequences, depending on which line of cases is, or might be, followed. The legal consequences of business conduct should not differ as to a question of federal law depending on where the litigation takes place. The Trustee respectfully requests a decision from this Court that will safeguard the predictability of commercial transactions and bankruptcy administration with regard to this pressing issue.

DATED: January 5, 1987

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